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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| WTC CONSULTING, INC.,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>NETWORKCOM CONSULTING, INC. et al.,<br><br>Defendants and Appellants. | B234115<br><br>(Los Angeles County Super. Ct. No. BC427010) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Ralph W. Dau, Judge. Affirmed.

ONE, Peter Afrasiabi, Christopher W. Arledge and Ian H. Gibson for Defendants and Appellants.

Tisdale & Nicholson, Guy C. Nicholson and Michael D. Stein, for Plaintiff and Respondent.

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WTC Consulting, Inc. successfully sued its former employee Karen Mattis and the competing company she had formed, Networkcom Consulting, Inc., for misappropriation of trade secrets. Mattis was also found liable for breaching her severance agreement with WTC. Mattis and Networkcom appeal. We affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND[1]

WTC is a telecommunications and information technology consulting company that provides services to institutional clients such as universities and medical centers. WTC has created a series of models and formulas for performing different aspects of its consulting work. Its models, formulas, and proprietary databases include:

(1) the capital model, a specialized software application that allows WTC to create operating models and formulas to predict for a client how much various technology options will cost initially;

(2) the port model, software that enables WTC to predict the size of a client's technology requirements over time;

(3) the life cycle operating cost model, a software application WTC uses to predict how much a given system will cost to maintain, update, fix, and operate;

(4) the telecommunication room assessment tool, software that permits WTC to assess the required investment in a centralized telecommunication center in order to house and provide suitable conditions for the heart of a telecommunication network;

(5) the telecommunication room profile model, which is a report identifying each of the necessary improvements for the equipment rooms and attaching average

[1] Our recitation of the facts is based on the evidence presented at trial viewed in the light most favorable to WTC as the successful plaintiff. (*Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, 693–694.)

costs in order to permit the creation of an overall improvement budget for equipment rooms;

(6) the outside plant segment model, which is a set of software designed to permit prediction of the costs associated with establishing a physical network across many buildings;

(7) the cost data program, a running assessment of the actual current costs of various products and services associated with telecommunications and information technology systems;

(8) the rate model, which helps institutions to determine the rates they should charge internally for computer support, telephone support, special arrangements, closed circuit television, and similar services provided by institutions to their various component offices;

(9) cost elements derived from rate work, information compiled by WTC concerning how other institutional rate systems operate to permit comparisons between institutional providers;

(10) rate work, the methods of using the models to help WTC perform its work for the client in a way that allows the models to be best used, explained, and implemented;

(11) the technical services agreement process, a method WTC developed to help clients negotiate and purchase large telecommunication and computer systems;

(12) the ACT database, a client contact information database that contains not only publicly available contact information for clients and prospective clients but also non-publicly-available or difficult to obtain information WTC has gathered over the years concerning the clients' needs, budgets, and buying habits; their present telecommunications systems and the ages of those systems; the clients' decisionmakers; individuals in a position to influence the ultimate decisionmakers; and details of conversations between WTC and client and/or prospective client representatives;

(13) WTC proposals, specifically WTC files on prospects, updated weekly, including the fruits of marketing research as to what prospects are real, the probability of closing a deal, an estimate of when any deal might occur, and the prospective value to WTC in consulting fees, as well as other information to sell WTC's services and to predict the resultant cash flow to WTC.

These client database, models and formulas are "valuable information that [WTC has] developed over the longevity of the firm."

WTC's work is done in various formats and programming languages, including Excel, Visual Basic, and dBase, and the software codes that develop reports are not made available to clients. Clients are provided with spreadsheets that are thousands of pages long with 20,000 to 30,000 elements; the underlying software code remains hidden with only ultimate values visible. WTC's formulas cannot be reverse-engineered from the proposals WTC generates. Their programs cannot be purchased, rented, or downloaded. They are never released "[b]ecause it is our proprietary information and it's what differentiates us. We're talking about the capital models, the life cycle operating cost models, the port models, the rate models. These are our customized software that we built over the years, and when we go talk to our clients, it's always competitive. Business doesn't just walk in the door and plunk itself down for us. We have to go compete for every single thing we get. And when we do that, we have to explain why we're the better fill [*sic*], of why we know how to do this, about how we're going to do it, so we just don't make it up. They need proof, they need evidence, and these models are that. We never sell it, we never rent it, we don't give it away, and we never expose it." WTC's formulas and models give WTC an edge over its competitors, and WTC has never seen a competitor that used similar models and frameworks.

WTC has taken steps to maintain the secrecy of its information and models. Mattis acknowledged at the commencement of her employment with WTC "that the consulting business of WTC is proprietary to WTC, and disclosure of WTC clients, business practices, nature of work, et cetera, would be extremely harmful to WTC." The employee handbook, which Mattis had received, cautioned employees that "The

protection of confidential information and trade secrets is essential to WTC, its clients, and the future employment security of its employees. To protect such information, employees may not disclose any firm trade secrets or confidential information. Employees who improperly disclose sensitive information, confidential information, or trade secrets, are subject to disciplinary action up to and possibly including termination." The handbook also set forth a confidentiality policy charging each employee with "safeguarding the confidential information obtained during employment." It advised employees, "You have the responsibility to prevent revealing or divulging any such information, unless it is necessary for you to do so in the performance of your duties. The confidentiality agreement remains in effect after an employee terminates. Any breach of this policy will not be tolerated and legal action may be taken by the firm."

WTC maintains a firewall on its computer server to prevent outsiders from accessing information and uses multiple password systems to protect the information. The client database and the firm's operating models and formulas are stored on the computer server.

Mattis worked at the company for ten years in sales and consulting. On February 13, 2009, WTC laid off five employees, including Mattis. Mattis remained in possession of her company laptop computer until February 18, 2009.

On February 13, 2009, beginning shortly after noon, approximately 356 files and folders were created on the WTC laptop issued to Mattis in a rapid sequential manner, indicating that they were copied from another location onto the laptop. On February 18, 2009, at 4:08 p.m., an external hard disk drive was attached to the laptop. Between 4:10 p.m. and 6:15 p.m., files were transferred from the laptop to the external hard disk drive in a rapid sequential manner in a large scale data transfer. At least 34,542 files were transferred during that time. Between 3:08 p.m. and 4:53 p.m. that same day, at least 52 PDF files of contact data were created on the laptop. Beginning at 6:12 p.m., 126 files and folders that had been created between February 13 and February 18, 2009, were moved into the computer's recycle bin and the bin was then emptied, deleting those files.

Mattis was the person who downloaded files from WTC's main computer server to her laptop. She arranged for the files she had copied to be copied to a hard drive and then transferred to a new computer she had purchased within days of the termination. Mattis delayed returning the company laptop to WTC while she completed the copying process, and she misrepresented to WTC the reason for the delay. She never asked for permission to download files from the WTC server to her laptop on or after her termination date, nor did she disclose downloading and copying files to an external hard drive.

Mattis received a severance payment of $94,200. As part of her severance agreement, Mattis agreed that within five days she would destroy or deliver to WTC all property and materials in her possession or under her control belonging to the company, including "all trade secrets and confidential information of the company, and any documents or materials that describe or refer to such trade secrets and/or confidential information"; this included documents, electronic files, and electronic data.

After her termination, Mattis formed a competing company, Networkcom Consulting, Inc. Soon after the severance agreement was signed, WTC learned that Networkcom had presented WTC's promotional Power Point presentation at a trade show to promote Networkcom. While the presentation was not itself a trade secret, its use alarmed WTC because WTC property was being presented as if it were Mattis's work.

This discovery prompted WTC to investigate what Mattis might have done with other WTC proprietary information. First, WTC learned that immediately after her termination, Mattis had begun downloading files with client and WTC information. The files contained trade secrets. The first set of files Mattis downloaded pertained to Florida State University: "There are dozens of folders that were copied, and those would have dozens of files within them. The prop [short for proposal] data directory contains files that have our proposals to a prospective client, which would show what we were planning on—what work we were planning on doing for them, how much we were going to charge them, all of the parameters of the work." Mattis downloaded similar information concerning seven other clients. WTC's vice president explained why this was so alarming: "The very first file that I saw was for Florida State University, which was at

the time one of our major clients. Ms. Mattis had had no association with them. There would be no reason for her to have these files on her computer. The other files were—or some of the other files were the clients we were trying to get at the time. We were desperate for new clients. This meant someone else had all of our information that we were going to use to try to get these clients." Mattis had not performed any work for Florida State University and had no relationship with that institution.

The files that Mattis had downloaded included models, formulas, and software programs designed by WTC. Phillip Beidelman explained, "[T]he proposal data directory[] is where we keep our pricing schedules. That's where we develop our cost information for our own internal quotations and bids. It's where we might do preliminary work that involves the life cycle models, the rate models, and it's all inside these folders." It included billing and markup, pricing strategies, and how and when WTC would perform the work. The information in the files downloaded by Mattis would enable a competitor to underbid WTC.

In late 2008, WTC had made a proposal to San Diego State University (San Diego State) to perform some rate work. That proposal had been prepared by Zahid Masood, who was then a WTC employee. A few months later, San Diego State publicly announced its intent to hire WTC to do the rate work. In June 2009, however, Networkcom submitted a proposal for the rate work—a proposal also authored by Masood, who was now working with Networkcom. Networkcom was awarded the contract and was paid $49,000. Mattis estimated that the net profit from the work was $21,000.

The University of California Hastings College of Law (Hastings) was a WTC client. On February 17, 2009, WTC submitted its proposal for the next stage in work that it had been performing for Hastings. The following day, Mattis used her WTC laptop to communicate with Hastings regarding her own planned independent proposal for the work. She advised Hastings that in her proposal she would remove all WTC's overhead costs. Mattis submitted a proposal to Hastings on February 25, 2009. That proposal was extremely similar to WTC's proposal at multiple points, down to repeating a

typographical error from WTC's proposal. Mattis acknowledged using the WTC proposal as a template for hers.

Later in 2009, after sending another proposal to Hastings that was extremely similar to a WTC proposal, Networkcom succeeded in obtaining a Hastings contract at a gross contract price of $75,000. Networkcom's expenses were minimal, approximately $3,000.

Networkcom's successful Hastings proposal bore striking similarities to one of WTC's proposals. It was dated after the date of the severance agreement, indicating to WTC that despite her agreement to return or destroy all WTC property Mattis still possessed WTC files and was using their language in her proposals. Mattis also contacted and solicited work from several WTC clients whose information appeared in the WTC database.

Although the Power Point presentation and the submitted proposals were not trade secrets, WTC was alarmed by Mattis's use of WTC work. WTC engaged an expert to examine the computer to determine how it had been used between February 13 and February 19, 2009, and learned the extent of Mattis's file copying. WTC sued Networkcom and Mattis. WTC's breach of contract claim against Mattis and the misappropriation of trade secrets cause of action against both Mattis and Networkcom were tried by jury.

Prior to trial, WTC filed a motion in limine seeking to exclude evidence of marital infidelity on the part of WTC president Phillip Beidelman on the basis that it was irrelevant (Evid. Code, § 350) and also more prejudicial than probative (Evid. Code, § 352.) The court excluded the evidence in question until further order of the court, noting that as the trial unfolded, the court might find it necessary to permit the introduction of the evidence.

At trial, WTC Vice-President Charlotte Beidelman testified that WTC had created dozens of rate work models over the years. WTC did not contend that Mattis had used all of them, and she could not identify which specific models Mattis had used. Charlotte Beidelman explained that she could not know exactly which secrets Mattis had used

"[b]ecause the trade secrets we're talking about are done in the background, they're done in your office. They aren't made public, nobody sees what you're doing when you're sitting in your office and doing your work. So unless I was sitting in her office watching her work, I wouldn't know what she has used."

WTC President Phillip Beidelman testified that he does not know what WTC trade secrets Mattis currently possessed because "I can't sit and work looking over . . . Ms. Mattis's shoulder while she uses what we believe she's taken. I don't know positively that she has." Phillip Beidelman admitted not knowing whether Mattis used any WTC trade secrets in performing work for San Diego State or others, and he acknowledged that it is possible to do the kind of consulting that WTC does without WTC's trade secrets. However, the work is made easier with WTC's models and formulas, and access to the models and formulas would enable a competitor to do the work at a lower cost. He testified to the effect of the dissemination of WTC's operating models, formulas, and software programs: "Anytime that kind of unique information is released, it turns it into a commodity, it makes it harder to differentiate yourself and you lose the ability to sell people because they don't see any difference between you and the next guy."

Mattis acknowledged that she downloaded files from WTC's main computer server to her laptop after her employment was terminated, and that she knew this included a tremendous amount of WTC's property. The laptop contained WTC's confidential and proprietary formulas and models. She arranged for the files to be transferred to her new computer. She admitted that she did not disclose her downloads and copying to WTC or ask permission to do it. Mattis claimed that she did not inform Phillip Beidelman of the file copying because it was none of his business that she was copying his computer's contents to another device. She acknowledged that when she used the Power Point presentation at the trade show, the presentation belonged to WTC and was not her property but she displayed it as her own. Mattis acknowledged using various WTC documents to prepare hers, but claimed she was the author of all of those

documents. She denied using WTC materials to obtain business or perform her work for Hastings and San Diego State.

WTC presented a damages expert, Michael Rosen. Rosen concluded that the appropriate measure of damages would be based on the time and effort WTC had put into developing their trade secrets and the costs saved by Networkcom by being able to copy them. Rosen estimated the total cost of each of the 12 types of asserted trade secrets at issue in the case. Totaling up these amounts and discounting the total by 20 percent to reflect depreciated value due to age, Rosen concluded that Networkcom derived $3,105,000 in cost savings gains from taking WTC's trade secrets.

The jury found that Mattis had breached her contract with WTC and awarded damages of $94,200 on that claim. The jury found that Networkcom and Mattis willfully and maliciously misappropriated WTC's trade secrets and awarded $124,000 to WTC. The trial court ordered Mattis and Networkcom to pay punitive damages of $100,000, and enjoined them and others working with them or on their behalf from using any of the files that were copied from WTC, including the various categories of trade secrets that were the subject of the trial. Networkcom and Mattis appeal.

## DISCUSSION

### I. Sufficiency of the Evidence of Trade Secrets

Mattis and Networkcom first contend that there was insufficient evidence of any trade secrets. "'Under the substantial evidence standard of review, "we must consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.] [¶] It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment."' [Citation.] 'All presumptions favor the

trial court's ruling, which is entitled to great deference . . . .' [Citation.]" (*In re Estate of Kampen* (2011) 201 Cal.App.4th 971, 992.)

Civil Code section 3426.1, subdivision (d), defines a trade secret as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: [¶] (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [¶] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Here, appellants argue insufficiency of the evidence because none of the individual trade secrets was admitted into evidence. WTC, however, provided extensive evidence about the nature of its models, formulas, and databases; how and when they were developed; and their use in the course of WTC's work. Mattis, too, admitted that WTC's formulas and models were confidential and proprietary, and she acknowledged having agreed that their disclosure would severely harm WTC. Appellants dismiss this testimony on the basis of their evidence characterizing the formulas and models as basic spreadsheets populated by publicly available information, but appellants merely expose a conflict in the evidence that was resolved by the jury in WTC's favor. Considering the evidence in the light most favorable to the prevailing party and resolving evidentiary conflicts in support of the verdict, we conclude that WTC offered sufficient evidence of the nature and character of its trade secrets to support the judgment in its favor.

## II. Monetary Award on the Trade Secrets Claim

Appellants raise a variety of issues with the award of $124,000 to WTC on the cause of action for misappropriation of trade secrets.

### A. Burden of Proof and Evidence of Trade Secret Use

First, appellants contend that the trial court improperly shifted the burden of proof to them to disprove that they used the trade secrets rather than requiring WTC to establish evidence of wrongful use. Appellants fail to identify any order or ruling by which the

trial court shifted the burden of proof, and we have found none in our review of the record. The court instructed the jury that WTC had to prove that Networkcom and Mattis improperly acquired or used a trade secret to succeed on the trade secret misappropriation claim, and it also instructed jurors as to the burden of proof. This satisfied the trial court's obligation to instruct the jury as to which party bore the burden of proof on this issue. (Evid. Code, § 502.)

Although they claim the trial court erred, appellants' argument actually focuses on WTC's litigation strategy. They claim that WTC aimed to convince the jury that Mattis was dishonest and to argue without evidence that as a dishonest person she must have used WTC's trade secrets. We have reviewed the record and find that substantial evidence supported the jury's conclusion that Mattis and Networkcom used the trade secrets that Mattis wrongfully acquired from WTC. WTC provided evidence that Mattis downloaded a massive number of proprietary WTC files, including trade secrets, in the hours and days following the termination of her employment, without notice to or permission of WTC. WTC demonstrated that Mattis and Networkcom helped themselves liberally to WTC non-trade-secret work product and then used it as their own, in the case of the Power Point presentation; or copied extensively from it, in the case of the multiple proposals bearing marked similarities to WTC's proposals. WTC also proved that the day after WTC had submitted its proposal to its existing client Hastings, Mattis promised Hastings she could submit a proposal omitting WTC's overhead costs. Not only Networkcom's initial Hastings proposal but its subsequent successful proposal in August 2009 were extremely similar to WTC proposals.

While acknowledging that it was not impossible to perform the work without recourse to WTC trade secrets, WTC argued that it was more likely than not that in light of Mattis's unauthorized taking of the trade secrets, Mattis's and Networkcom's use of other WTC products as their own, and Mattis's deception and concealment of her conduct, that appellants made use of those secrets in performing their work on the Hastings and San Diego State projects. WTC encouraged the jury to conclude that Mattis and Networkcom used its trade secrets based on this indirect evidence of their use and to

reject Mattis's implausible denial that she used those secrets because she lacked credibility.

The jury could reasonably accept these arguments based on the evidence presented at trial, and it could infer from that evidence that Mattis and Networkcom used not only WTC's non-trade-secret output but also the trade secrets Mattis secretly downloaded and copied from the WTC server upon the termination of her employment. It is reasonable to infer from the evidence that the reason that Networkcom could offer Hastings a proposal that was nearly identical to WTC's, with a deliberate and express omission of WTC's overhead costs, was that Networkcom had appropriated and was using not just WTC's proposal letters but its trade secrets as well. Based on the evidence at trial the jury could reasonably conclude that it was more likely than not that Mattis and Networkcom used WTC trade secrets in performing work for San Diego State and Hastings.

Contrary to appellants' claim, it is of no consequence that no witness testified to personally seeing Mattis or Networkcom use particular trade secrets, nor is Mattis's denial that she used WTC trade secrets dispositive. "[T]he fact that evidence is 'circumstantial' does not mean that it cannot be 'substantial.' Relevant circumstantial evidence is admissible in California. [Citation.] Moreover, the jury is entitled to accept persuasive evidence even where contradicted by direct testimony." (*Hasson v. Ford Motor Company* (1977) 19 Cal.3d 530, 548, overruled on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548.)

Appellants rely on *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, but that case does not support their argument. In *Sargent Fletcher*, a trade secret misappropriation case, the appellate court concluded that the trial court had properly rejected a plaintiff's proposed jury instruction that would have placed the burden of proof on the defendant to demonstrate that it did not use the plaintiff's trade secret through improper means. (*Id*. at pp. 1668, 1674.) The *Sargent Fletcher* court discussed the general requirements of the Evidence Code as to the burden of producing evidence (*id*. at pp. 1666-1668) and restated Evidence Code section 500's provision that "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or

nonexistence of which is essential to the claim for relief or defense that he is asserting" (*id*. at p. 1668), but nowhere did it state that indirect evidence, such as that presented here, is insufficient to satisfy the burden of proof. Appellants may equate indirect evidence with an absence of what they term "actual evidence," but *Sargent Fletcher* neither makes nor lends support to such an equivalency. Appellants have not demonstrated an improper shifting of the burden of proof on the issue of use of trade secrets or an absence of evidence to support the jury verdict.

B. Sufficiency of the Evidence of Unjust Enrichment

Appellants argue that WTC had no evidence of unjust enrichment with respect to the Hastings and San Diego State contracts. In this argument, appellants disparage the testimony of WTC damages expert Rosen and repeat critical comments made by the trial court outside the presence of the jury about this testimony, but the main thrust of their argument is redundant of their overall claim that there was no evidence of use of the trade secrets: Appellants again focus on the absence of direct evidence that they used WTC trade secrets in securing the work or performing under their contracts with the institution, as well as WTC's acknowledgements that it lacked direct knowledge of appellants' use of the secrets in conjunction with the contracts and that it was not impossible to perform the work without access to its trade secrets. From the evidence presented at trial about Mattis's intentional taking of the trade secrets, her intentional concealment of her conduct, her efforts to preserve those secrets in multiple locations (a hard drive and her new computer), her active use of WTC work product, her copied proposal to Hastings, and her securing of projects from WTC clients soon after she misappropriated WTC's trade secrets, the jury could reasonably infer that Mattis and her new company used the trade secrets she had taken from WTC in conjunction with the Hastings and San Diego State work. "As far as the law is concerned, it makes no difference whether evidence is direct or indirect." (CACI No. 202.)

Appellants also contend that the court should have "rejected out-of-hand any award based on the testimony of Michael Rosen." They allege that the court was

skeptical of the expert's testimony and include a citation to an attorney's declaration stating that outside the presence of the jury the court characterized the expert's testimony as "bogus" and "preposterous." This statement was allegedly made during the discussion of closing jury instructions. Appellants state, "However, despite Defendants' request, the trial court did not strike the testimony and instead allowed the jury to assess it as within the realm of reason." They neither explain the nature of this request nor direct this court to any motion to strike the testimony in the record. Furthermore, appellants note that the jury's award reveals that the jury may have rejected Rosen's damages calculation of $3,000,000. They assert that the jury should have been told that the expert's testimony was "preposterous junk science," for the failure to so advise the jury left it to think that the expert had "credibility and weight" but that his numbers were simply too high. "This alone was error and denied a fair trial as detailed *infra*," appellants conclude. Appellants do not cite to any legal authority to justify such a jury admonition, nor do they identify any instance in the record where they requested such information be conveyed to the jury. "We need not address points in appellate briefs that are unsupported by adequate factual or legal analysis." (*Placer County Local Agency Formation Com. v. Nevada County Local Agency Formation Com*. (2006) 135 Cal.App.4th 793, 814.)

C. Evidence of Expenses Associated with the Hastings and San Diego State Contracts

Appellants allege that the jury "impermissibly ignored" Mattis's testimony as to expenses associated with the performance of the contracts with Hastings and San Diego State, but they provide no argument or legal authority to support their contention that disregarding Mattis's testimony on this point was legally impermissible. The jury was entitled to disregard this testimony if it found it incredible. "The trier of fact may reject even uncontradicted evidence as not credible." (*In re Marriage of Hofer* (2012) 208 Cal.App.4th 454, 460.)

Indeed, there were reasons for the jury not to credit Mattis's testimony in general and this testimony specifically. As an overall matter, Mattis was impeached more than

once with her prior statements, after which she attempted to avoid the implication that she was lying by stating that she had interpreted questions in an alternative manner. She made allegations that the jury was likely to disbelieve, for example that it was none of WTC's business that she copied 35,000 files from a WTC computer. At deposition she had claimed not to remember copying files on the day her employment was terminated, but suddenly remembered that she had done so later on when she was advised of the forensic analysis of the WTC laptop. Mattis had lied to WTC, delaying the return of the laptop to WTC ostensibly because she was having difficulty dressing due to a broken leg when in fact the real reason she was not ready for him to pick up the laptop was that she was away from home having the WTC files copied from the laptop.

With respect to Mattis's credibility on the specific issue of project costs, she first testified that Networkcom's expenses on the San Diego State University work were minimal, approximately $3,000. Then Mattis changed her position and testified that in fact the expenses were $28,000 (out of a contract price of $49,000). She testified that the expenses were minimal on the Hastings contract, at approximately $3,000, for a net profit of $72,000 on that project. But elsewhere in her testimony Mattis claimed that none of Networkcom's three significant projects (two of which were the work for Hastings and San Diego State) was profitable because of the costs incurred and that Networkcom had actually lost money on them. In light of the constantly shifting testimony about the expenses of performing under the contracts and Mattis's overall credibility problems, we find nothing impermissible about the jury's failure to credit Mattis's testimony as to the costs associated with the two contracts. The jury is entitled to reject in its entirety the testimony of a witness who the jury concludes has deliberately testified untruthfully about something important; alternatively, it may accept the portions of the witness's testimony it believes to be true and disregard the rest. (CACI No. 5003; see also Evid. Code, § 780 [factors relevant to the jury's credibility determination include a witness's prior inconsistent statements and admitted untruthfulness].)

Appellants again raise their dissatisfaction with WTC's damages expert in the course of this argument. Here, appellants assert that the jury ignored Mattis's evidence

"in the context of testimony that the judge recognized was preposterous but the jury was not told that as it should have been told." It is unclear what connection the testimony of the damages expert has with the issue raised in this portion of the brief. Moreover, although appellants claim that the jury should have been advised "that it could not credit the expert's testimony at all because the expert had, to put it politely, overreached impermissibly," they offer no argument or authority in support of this assertion and identify no request for a jury admonition of this sort in the record. "Mere suggestions of error without supporting argument or authority . . . do not properly present grounds for appellate review." (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1066, 1078.)

D. Mattis as an Unjustly Enriched Party

Next, Mattis argues that even if there was unjust enrichment, it was error to conclude that she was personally unjustly enriched in the amount of $124,000, representing the combined payment for the contracts with Hastings and San Diego State, because Networkcom was the contracting party and the jury made no finding of alter ego liability. Appellants, however, made no distinction between Mattis and Networkcom in the proceedings below. They did not request that the special verdict form separately identify the damages attributable to Mattis personally rather than the company, nor did they object to the special verdict form's phrasing on the ground that it did treated them jointly. Appellants have not shown that they requested jury instructions on corporate liability or alter ego liability or that they asserted this theory at any point in the trial court. Having failed to raise this argument in the trial court, Mattis has forfeited it on appeal. (*Premier Medical Management Systems, Inc., v. California Insurance Guarantee Association* (2008) 163 Cal.App.4th 550, 564 [appellate courts ordinarily do not consider

claims made for the first time on appeal which could have been but were not presented to the trial court].)[2]

### III. Monetary Award on the Breach of Contract Claim

Mattis claims that she is entitled to judgment in her favor on the breach of contract claim because the $94,200 award representing unjust enrichment was "partial rescission of the severance agreement" that Mattis was found to have breached. It appears that her argument is that since the $94,200 amount corresponds to the amount of the severance payment that WTC paid to her under the parties' contract, the effect of the jury's award is that WTC retains the benefits received under the contract but receives back the consideration for the agreement by means of the jury's award. That, Mattis concludes, is an improper partial rescission of the agreement.

Although Mattis cites a tremendous amount of case law concerning rescission, none of her authorities stands for the proposition that the amount of a monetary award can be interpreted as a jury forcing a party to rescind a contract, nor can the jury's determination that WTC was damaged[3] in the amount of $94,200 by Mattis's breach of contract be understood as a rescission. Moreover, the jury's verdict and the trial itself had no effect on the enforceability of the severance agreement; each party still retained the benefits of the contract and was bound by its obligations. The jury made no findings about obligations under or the continuing viability of the severance agreement, determining only that $94,200 was the proper award of damages to compensate WTC for Mattis's breach of the agreement. Mattis has not established any error by virtue of the

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[2] Our conclusion upholding the jury's award on the trade secret misappropriation claim makes it unnecessary to address appellants' contention that reversal of that award necessitates the reversal of the associated punitive damages award.

[3] We acknowledge that an unjust enrichment award is in the nature of restitution rather than damages (*Ajaxo, Inc. v. E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 56-57 (*Ajaxo*)), but we use the term "damaged" here because the parties employed that term on the special verdict form to describe the monetary award as a result of the breach of contract.

fact that the amount of the award corresponds to the amount she had received under the terms of the severance agreement, nor has she established any entitlement to complete rescission of the severance agreement on account of the correspondence of these amounts. She is, moreover, incorrect in the assertion that unjust enrichment awards of the defendant's profits are unavailable on a claim for breach of a contract protecting trade secret information in the absence of rescission of the contract. (See, e.g., *Ajaxo, supra,* 135 Cal.App.4th at pp. 55-57.)

## IV. Ruling on Motion in Limine No. 1

Appellants argue that the trial court abused its discretion and denied them a fair trial when it excluded evidence that Mattis and Philip Beidelman had had an affair. They claim to have been "unable to defend themselves and present their theory of the trade secret case" as a result of the ruling.

Appellants rely on a series of inapposite cases to support their contention that they were denied a fair hearing. In *Fewel v. Fewel* (1943) 23 Cal.2d 431, the trial court refused to hear a party's evidence and modified a custody order based on a court investigator's report. In *In re Waite's Guardianship* (1939) 14 Cal.2d 727 the court refused to permit the party petitioning for letters of guardianship to testify, and in *Caldwell v. Caldwell* (1962) 204 Cal.App.2d 819 the court refused to allow a spouse in a divorce case to testify. In all of these cases a party was entirely precluded from testifying or from presenting any evidence. Nothing similar occurred here, where the defendants were permitted to present their substantive defenses but were precluded from introducing evidence of a prior personal relationship between the parties that would serve only to impugn the motives of the plaintiff while not tending to establish any substantive defense.

Nor is this case akin to *Gordon v. Nissan Motor Co.* (2009) 170 Cal.App.4th 1103, in which the trial court precluded expert testimony on the question of defective roof design in a motor vehicle. The ruling in *Gordon* was reversible per se because it precluded the plaintiff from proving his claim that the roof had been defectively designed. (*Id*. at p. 1116.) In *Gordon,* the evidence that was excluded was relevant and

probative on the question of the plaintiff's entitlement to damages for defective design of the vehicle in question. Here, however, the evidence of the prior relationship would not tend to establish a defense to the trade secret misappropriation or to demonstrate that Mattis did not breach her contract with WTC: the defense theory of the case may have been "that the real motivation for this suit was not trade secret theft, but was rather vengeance," but that is not a defense to either cause of action. Moreover, nothing in the trial court's ruling excluding this evidence precluded appellants from introducing evidence that they did not misappropriate trade secrets and that Mattis did not breach the contract with WTC. Appellants have not demonstrated that the exclusion of this evidence amounted to an erroneous denial of all evidence relating to a claim or essential expert testimony without which a claim cannot be proven such that reversal per se is warranted. (See *id*. at p. 1114 [discussing exclusions of evidence that are reversible per se and those for which prejudice must be shown].)

Even if the exclusion of this evidence was not reversible per se, appellants argue, it was an abuse of discretion. They contend that the evidence was highly relevant, that it was not unduly prejudicial, and that it was probative of the reasons for the suit. We disagree. Evidence of marital infidelity is ordinarily inadmissible because it is typically irrelevant and tends to "smear" a person's character. (*Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1026.) Evidence of an affair may be admissible when it directly relates to an issue in the litigation, such as in a bereaved spouse's wrongful death action in which extramarital affairs could be relevant to assessing the losses suffered; or when it has a connection to a substantive issue, such as establishing the motive for a spousal murder. (*Ibid*.) Such evidence, however, is not properly admissible in a case where the issue is whether a vehicular accident was caused by a tire defect or by an overloaded vehicle. (*Id*. at p. 1027.) This case is about trade secret theft and breach of contract, and appellants have not demonstrated that the excluded evidence related to a substantive issue in the litigation. The trial court did not abuse its discretion in concluding that evidence of an alleged affair between

Phillip Beidelman and Mattis was more prejudicial than probative and excluding it under Evidence Code section 352.

**DISPOSITION**

The judgment is affirmed. Respondent shall recover its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.